No. 82-1758

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

KEITH MILTON RHINEHART, *et al.*,
Petitioners,

v.

THE SEATTLE TIMES, a Delaware corporation
d/b/a THE SEATTLE TIMES, *et al.*,
Respondents.

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI

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May 31, 1983

QUESTION PRESENTED FOR REVIEW

May a plaintiff in a civil action for defamation and invasion of privacy assert a constitutional privilege to withhold relevant evidence while simultaneously seeking damages premised upon the allegedly privileged information?

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The respondents respectfully pray that the writ of certiorari requested by the petitioners herein be denied by this Court.

JURISDICTION

This Court lacks jurisdiction to review the issues tendered in the Petition for Writ of Certiorari (hereinafter "Cross-Petition"). Petitioners have asserted that jurisdiction exists under 28 U.S.C. § 1257(3). That statute grants this Court jurisdiction only over final judgments or decrees from state courts. The Order Compelling Discovery is not final.

STATEMENT OF THE CASE

I.

COMPLAINT FOR DEFAMATION AND INVASION OF PRIVACY

On February 15, 1980, Keith Milton Rhinehart, the Aquarian Foundation, and several members of the Foundation commenced an action in King County Superior Court in Seattle for defamation and invasion of privacy. Named as defendants were two daily newspapers, the Seattle Times and the Walla Walla Union-Bulletin, and several journalists currently or formerly employed by those newspapers.[1]

According to the complaint, defendants had falsely and with actual malice portrayed Rhinehart as a religious and financial charlatan, who used "wealth to buy religious converts" by "selling fraudulently-produced stones" for outrageous sums, by administering "consciously perpetrated frauds" to the public, and by using the Foundation as his personal "alter ego." Plaintiffs also complained about the newspapers' alleged characterization of the Foundation as a "bizarre Seattle cult" and their description of a Rhinehart performance before inmates of the state prison in Walla Walla. They claimed that defendants' coverage of their activities had resulted in a loss in Foundation membership, impaired Rhinehart's ability to communicate with Foundation members, and caused a decline in anticipated contributions and donations from members and from the general public.[2]

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[1] Other than wholly-owned subsidiaries, there are no parent companies, subsidiaries or affiliates of the Seattle Times Company and the Walla Walla Union-Bulletin, Inc. *See* Rule 28.1, Sup. Ct. R.

[2] Petitioners' Petitioners' claim that the publications had caused a decline in donations and contributions is found in their complaint. *See* Appendix to Cross-Petition (hereinafter "Pet. App.") at 95a, 97a. It was subsequently reinforced by plaintiffs' interrogatory answers, which listed loss of donations and contributions as a chief element of damages.

II.

DEFENDANTS' INTERROGATORIES

On June 27, 1980, the Seattle Times served interrogatories upon the various plaintiffs. These interrogatories requested information relating to the elements of plaintiffs' various causes of action. When plaintiffs refused to provide adequate answers, defendants moved for an order compelling discovery. The trial court initially ruled on the various interrogatories in a letter ruling on February 25, 1981. (Pet. App. 72a-86a.) After further argument, the court issued an Order Compelling Discovery (Pet. App. 55a-60a) on June 26, 1981. This order was appealed to the Washington Supreme Court and is the subject of the Cross-Petition.[3]

A. Paragraph 1 of Order Compelling Discovery.

Paragraph 1 of the Order Compelling Discovery ordered Rhinehart to answer Interrogatory No. 28, concerning gifts and donations received since February 15, 1975, whether as taxable or as nontaxable income. This interrogatory asked the following:

> If you have been the recipient of gifts or donations in the past ten years, state the name and address of each donor, the date of the gift, the amount of the gift, and the circumstances of each gift.

In his answer filed on July 25, 1980, Rhinehart stated:

> Plaintiff hereby enters his objection of record to the form and substance of interrogatory No. 28. The

[3] The Cross-Petition does not designate which of the eight interrogatories that were challenged before the Washington Supreme Court should be reviewed by this Court. In asserting that the federal question was timely and properly raised, petitioners quote the Foundation's answer to Interrogatory No. 27 and Rhinehart's answer to Interrogatory No. 31, neither of which was appealed to the Washington Supreme Court. They also mention the Foundation's response to Interrogatory No. 24, although it was only one of the interrogatories appealed by the Foundation. One petitioner, Bailey, does not even allege any timely assertion of the federal question. (Cross-Petition at 4-5.)

> question is not with the perview [sic] of discovery, and to answer the same would invade the privacy and other constitutional rights of members of the Aquarian Foundation.

(Resp. App. 2a.)[4]

In its initial ruling of February 25, 1981, on defendants' motion to compel, the trial court noted that plaintiffs were claiming that "voluntary support for the Aquarian Foundation has substantially diminished as a result of the allegedly libelous publications." How, the court asked, could plaintiffs "make this allegation on the one hand and on the other hand object to inquiry"? The court required Rhinehart to answer the interrogatory unless an amended response shows "a definite reason" why it should not be answered. (Pet. App. 73a-74a.)

Rhinehart then announced that he had "personally pledged" secrecy to his particular donors and that the interrogatory violated the donors' rights. He also claimed that questions relating to gifts were not strictly relevant to his own claim because his damages included "a decline in 'donations' which are made to me which are classified by the Internal Revenue Service as payment for services." (Pet. App. 62a.)

In response, defendants contended that the information was directly relevant to plaintiffs' claims. The Seattle Times also argued that Rhinehart's attempted distinction between some kinds of "donations" and other kinds of "donations" was without substance. Defendants also offered an affidavit that showed that "significant amounts of funds are paid to Rhinehart over and above his salary from the Aquarian Foundation." Thus, defendants contended, "determining the sources of Rhinehart's funds" was directly relevant both to Rhinehart's damage claims and the central issue of falsity in the Seattle Times' alleged characterization of Rhinehart as an "unfit" cult leader who personally profits from his followers and uses the Foundation as his "alter ego." The trial court ordered the interrogatory answered. (Pet. App. 56a.)

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[4] Citations to the appendix to this Brief are designated as "Resp. App. ".

B. Paragraph 4 of Order Compelling Discovery.

Paragraph 4 of the Order Compelling Discovery required Rhinehart to answer Interrogatory No. 42, because his existing answer was "unresponsive." (Pet. App. 56a.) The interrogatory requested Rhinehart to "list all of your current assets and liabilities, or attach a current financial statement to your answers to these interrogatories." In answer, Rhinehart stated: "See tax returns produced in compliance with request for discovery." Rhinehart failed to object to this interrogatory. (Resp. App. 2a.)

In its initial ruling, the trial court recognized that Rhinehart was claiming that the Seattle Times had defamed him by revealing to the public that he was "a fraud and engages in fraudulent and deceptive practices for the purpose of extracting substantial sums of money from gullible persons." Because a penniless Rhinehart was not necessarily an honest Rhinehart and a rich Rhinehart not necessarily a dishonest Rhinehart, the court said that it did not "have an adequate basis" for ordering the interrogatory answered and asked defendants to make "a written showing that would justify compelling an answer." (Pet. App. 75a-76a.)

In response to the request, defendants stated that the interrogatory went directly to the issue of falsity in the Seattle Times' articles about Rhinehart, such as whether the Foundation serviced Rhinehart as his "alter ego," with "no segregation" of assets. Information was needed to determine how Rhinehart had become a millionaire, defendants noted, and there was no meaningful way "to establish the truth of the publications except by examining the respective assets and liabilities of Rhinehart and the Foundation." If Rhinehart's personal wealth was accumulated at the expense of the Foundation, its members, and its donors, then articles to that effect were neither false nor defamatory. Defendants also reminded the court of Rhinehart's failure to object to the interrogatory.

Plaintiffs countered by asserting that the answer to the interrogatory, which merely sought a list of assets and liabilities, would not itself prove that Rhinehart was a fraud. The trial court ordered that the interrogatory be answered.

C. Paragraph 5 of Order Compelling Discovery.

Paragraph 5 of the Order Compelling Discovery (Pet. App. 57a) directed the Foundation to answer Interrogatory No. 5, which asked it to identify individuals contacted by its attorneys, or someone acting on behalf of it or its attorneys in connection with the claims in the complaint. The Foundation listed twelve names in its answer filed on July 25, 1980. The only objection raised was that the information was within the knowledge of the Foundation's attorneys rather than the Foundation itself. (Resp. App. 2b.)

In its letter ruling of February 25, 1981, the trial court recognized that the answer was patently inadequate and that there were "no sustainable objections" to the interrogatory. Because the information sought by the defendants was "no less discoverable because it is within the knowledge of an attorney of the responding party," the court directed plaintiffs to answer the interrogatory. (Pet. App. 76a.)

On March 30, 1981, the Foundation filed an amended answer listing certain individuals but refused to supply addresses for many of the names. At this time, the Foundation sought to state an objection. (Pet. App. 64a-66a.) In response, defendants noted that plaintiffs' newly-discovered objection was not timely and reminded the court that it was improper for them to "treat the Civil Rules as a license to run a shell game on witnesses." Defendants also questioned how rights of privacy and association could be invoked to cloak addresses of individuals already publicly indentified in answers to interrogatories. The trial court ordered the interrogatory answered.

D. Paragraph 7 of Order Compelling Discovery.

Paragraph 7 of the Order Compelling Discovery required the Foundation to answer Interrogatory No. 19 and specifically stated that the supplemental answer to this interrogatory, which asserted an alleged privilege to conceal the name and location of the Foundation's bank, was "unresponsive." (Pet. App. 57a.) Interrogatory No. 19 required the Foundation to state the name of each bank, credit union, or other lending institution to

which it had submitted financial statements within the past ten years. (Resp. App. 2b.)

The interrogatory answer submitted by the Foundation on July 25, 1980, refused to reveal the name of one of the banks to which a financial statement was submitted. Plaintiffs announced that the name would be withheld "because the Aquarian Foundation does not want to reveal the city in which . . . temporary living quarters are being purchased" for Foundation officials. (Resp. App. 2b-3b.)

In its February 1981 letter ruling, the court observed that plaintiffs were asserting the right to "conceal the location of a bank with which the Aquarian Foundation is doing business on the theory that it would reveal temporary living quarters of persons active in the Foundation including the plaintiff Rhinehart." The court concluded that the information was directly relevant and, therefore, ordered the Foundation "to respond fully to Interrogatory No. 19 and the objection stated in the answer is disallowed." (Pet. App. 77a.)

Plaintiffs submitted a supplemental answer in which they repeated their objection, refused to comply with the court's order, and asserted that compliance with this interrogatory would force Rhinehart "to move once again to protect his personal safety." (Pet. App. 67a.) In reply, defendants observed that the new answer, an apparent "attempt to invoke some sort of new and unknown privilege to deny discovery into the location of the Foundation's bank," was evasive and that the information sought was clearly relevant. The trial court ordered the interrogatory answered.

E. Paragraph 8 of Order Compelling Discovery.

Paragraph 8 of the Order Compelling Discovery required the Foundation to answer Interrogatory No. 21. (Pet. App. 57a.) This interrogatory asked for the names and addresses of Mel Wertz, Julie Sequin, Allen Jenne, Bob Girrard, Doris Walton, and Florence Remoy. The Foundation answered this interrogatory as follows:

> The names are as stated in the question. With the exception of Mr. Bob Girrard, who was secretary

> of the corporation in 1976, the other named individuals are not now, nor in the past ten years have been officers or directors of the Aquarian Foundation. The corporation, therefore, is seeking permission from the named individuals prior to disclosing any addresses the corporation may have.

(Resp. App. 3b.) No objection was raised to this interrogatory.

Thus, in its letter ruling of February 25, 1981, the trial court recognized that there was "no stated objection to Interrogatory No. 21" and ordered that the information be provided "if those addresses are available to or in the possession or known to the Aquarian Foundation." (Pet. App. 77a.) In response, plaintiffs submitted an amended answer, raising numerous objections. (Pet. App. 67a-68a.)

Defendants then filed a memorandum in which they reminded the court of plaintiffs' failure to object on a timely basis. They noted that the interrogatory sought the names and addresses of the very individuals who had served as trustees of various so-called "funds," which had sponsored various prizes offered inmates during the Rhinehart performance at the Walla Walla prison, including "the $2,000 sex-change operation" that figured prominently in plaintiffs' complaint. Defendants also contended that these various entities were "the 'alter ego' of Rhinehart and his group" and, therefore, that the information was directly relevant to the truth or falsity of the publications in question.

Therefore, defendants asserted that they were entitled to interview and depose these alleged "trustees," to learn who had created the groups and provided their funds and to establish the source of the various Walla Walla prizes. The trial court ordered the interrogatory answered.

F. Paragraph 9 of Order Compelling Discovery.

Paragraph 9 of the Order Compelling Discovery required the Foundation to answer Interrogatory No. 24, concerning gifts and donations received by it since February 15, 1975. The court ordered that plaintiffs include "donations for renewal of

membership or donations for new memberships, and contributions to causes, marches, private readings, group seances, causes, or in connection with sacred objects." (Pet. App. 57a.)

The Foundation answered this interrogatory on July 25, 1980, stating that it did not keep records of all gifts and donations by name and address of donor, date of gift, amount of gift, and circumstance of gift during the weekly services held at various branches. The Foundation objected to stating names and addresses of donors "on the ground that . . . by revealing names and addresses of donors the defendants would have access to the names of all members." (Resp. App. 4b.)

In its letter ruling of February 25, 1981, the court ordered the interrogatory answered, because it went "directly to the issue of the plaintiff's claim that contributions to the Aquarian Foundation have diminished substantially by reason of the alleged libelous publications." The court also noted that plaintiffs had not offered any "valid objection" to the interrogatory. (Pet. App. 77a-78a.)

In response, plaintiffs attempted to submit a supplemental answer which raised numerous objections. The Foundation claimed not to possess the "detailed information" and "particular information" requested by the Seattle Times and also refused to comply with the discovery request because it had "personally pledged" not to reveal such information. The interrogatory also violated various constitutional rights, the Foundation added. (Pet. App. 68a-69a.) In response, defendants reiterated that the information went directly to the heart of plaintiffs' own claim for damages and asked the court to adhere to its prior ruling. The trial court ordered that the interrogatory be answered.

G. Paragraph 16 of Order Compelling Discovery.

Paragraph 16 of the Order Compelling Discovery directed plaintiff Kathi Bailey, one of the Foundation's officials, to answer Interrogatory No. 25. (Pet. App. 58a.) This interrogatory asked Bailey the names and addresses of the individuals who had served as trustees of the various "funds" that sponsored donations and gifts to the Walla Walla inmates.

Bailey answered on July 21, 1980, simply stating that she was "not authorized" by those individuals "to give their addresses out." (Resp. App. 2c.)

In its letter ruling of February 25, 1982, the court stated that her answer was "unresponsive" and granted defendants' motion to compel a complete answer. (Pet. App. 79a.) When Bailey later objected, defendants responded by showing the relevance of the information to plaintiffs' own claims. The trial court ordered the interrogatory answered.

H. Paragraph 17 of Order Compelling Discovery.

Paragraph 17 of the Order Compelling Discovery required Bailey to answer Interrogatory No. 28, for the time period from February 15, 1975, to the present. (Pet. App. 58a.) That interrogatory asked the following:

> If you have been the recipient of gifts or donations in the past ten years, state the name and address of each donor, the date of the gift, the amount of the gift, and the circumstances of each gift.

Bailey's answer, dated July 21, 1980, stated as follows:

> Donations from classes, weddings, funerals, spiritual consultations, etc., are reported to IRS—forms will be submitted when received from depository. Gifts received for birthday and Christmas were from friends and relatives.

(Resp. App. 2c.) In its letter ruling, the trial court noted that there was no objection to the answer as stated and, therefore, initially denied defendants' motion to compel a further answer. (Pet. App. 79a-80a.)

Defendants submitted a supplemental memorandum in which they reminded the court that it was plaintiffs' duty to frame a precise objection to the interrogatory and that where an interrogatory answer "is, on its face, patently unresponsive," the motion to compel should be granted. Defendants stated that answers to questions seeking information properly discoverable "may not be conclusory or vague" and that an

answer which "merely states that the information can be derived" from documents is generally insufficient.

Plaintiffs contended that the information was not discoverable simply because it was not directly relevant to Bailey's particular claims, that the question was too broad, and that the interrogatory was "another attempt by the defendants to ascertain the names of the members and donors of the Aquarian Foundation."

Defendants submitted a memorandum reminding the court that the information sought to ascertain if Bailey, like Rhinehart, personally pocketed donations to the Foundation. The interrogatory answers could "establish the truth of any inference in defendants' articles that the Foundation is a fraud." The trial court ordered the interrogatory answered.

III.

DISCRETIONARY REVIEW

The trial court entered the Order Compelling Discovery on June 26, 1981. Pending this Court's decision in a related case, the court retains full authority to change or modify its ruling. Paragraph 35 of the Order Compelling Discovery provides as follows:

> 35. Except where indicated otherwise, every order to answer a specific interrogatory requires the answering party to answer completely and fully under oath as to all information which is available to that party or his, her, or its counsel. Answers shall be served and filed within 30 days after entry of this order, provided that if any defendant seeks review of the protective order entered in this cause, answers shall not be due until such time as the court shall determine by order entered after the review process has been completed, with the court reserving the right to redetermine what discovery shall be ordered in the event the protective order is modified on review.

(Pet. App. 60a.) Defendants immediately sought appellate review of the Protective Order pursuant to a motion for discretionary review.[5]

Plaintiffs responded with a motion for discretionary review of the Order Compelling Discovery. The parties' respective appeals were consolidated on November 3, 1981. The Commissioner of Washington Supreme Court noted that it was "doubtful that the order compelling discovery by itself would merit review" but agreed to permit review since the court "has already agreed to review the propriety of the protective order." (Pet. App. 53a.)

After reviewing the briefs and hearing oral argument, the Washington Supreme Court unanimously upheld the Order Compelling Discovery:

> The plaintiffs, as the defendants point out, are attempting to assert a privilege to withhold evidence in a private suit where they seek damages based upon the allegedly privileged information. We have reviewed the cases cited in their brief and find none which supports the theory and the circumstances of this case. All of the evidence covered by the order compelling disclosure was relevant to the plaintiffs' claims and the defense of those claims, and their legitimate interests in privacy and association were protected by the court's order insofar as was possible without denying the defendants the right to develop their defenses.

(Pet. App. 33a.)

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[5] The Protective Order, upheld by the Washington Supreme Court in its decision below, is the subject of a separate Petition for a Writ of Certiorari filed by respondents herein on April 22, 1983, under Supreme Court Docket No. 82-1721.

REASONS FOR DENYING THE WRIT

I.

THE CASE AUTHORITIES DO NOT SUPPORT THE PROPOSITION THAT A PLAINTIFF MAY WITHHOLD RELEVANT EVIDENCE IN A PRIVATE LAWSUIT WHILE SIMULTANEOUSLY SEEKING DAMAGES BASED UPON THE SAME INFORMATION.

A. A Plaintiff Who Seeks Damages Cannot Refuse to Comply With Relevant Discovery.

A plaintiff cannot assert a privilege to withhold evidence while simultaneously seeking damages based upon the allegedly privileged information. Regardless of whether an evidentiary or testimonial privilege arises under the common law, statute, or the Constitution, the privilege is waived where the plaintiff affirmatively puts the information at issue, by seeking monetary relief based upon the allegedly privileged matter. Although petitioners vaguely assert (Cross-Petition at 9) that constitutional issues behind "compelled disclosure of church members and donors is a recurrent problem which should be resolved by this Court," they cannot cite a single decision that would support their theory in the circumstances of this case.

All of the information requested in respondents' interrogatories is directly related to the claims that petitioners themselves have put in issue. (Pet. App. 33a.) Thus, despite petitioners' attempt to associate their position with the First Amendment principles articulated by this Court in *NAACP v. Alabama*, 357 U.S. 449 (1958), this case does not involve state intrusion into associational or privacy interests. Rather, the case simply turns upon whether a plaintiff in an action for damages may be permitted to "use the First Amendment simultaneously as a sword and a shield." *Anderson v. Nixon*, 444 F. Supp. 1195, 1199 (D.D.C. 1978). *See also Independent Productions Corp. v. Loew's, Inc.*, 22 F.R.D. 266, 277 (S.D.N.Y. 1958); *McCormick on Evidence* § 103 at 222 (2d ed. 1972).

Petitioners brought a lawsuit seeking compensatory and punitive damages for defamation and invasion of privacy and claiming a decline in financial contributions and donations. The Washington Supreme Court required them to comply with discovery requests about the elements of that claim. The decision below simply followed the basic and well-established rule that "[e]very person who brings a lawsuit under our system of jurisprudence must bear disclosure of those facts upon which his claim is based." *Caesar v. Mountanos,* 542 F.2d 1064, 1068 (9th Cir. 1976), *cert. denied,* 430 U.S. 954 (1977) (rejecting constitutional privacy privilege where plaintiff places privileged matter at issue).

At issue is not whether the First Amendment protects membership lists from unnecessary or casual disclosure.[6] Instead, the question is whether a plaintiff, by bringing suit upon allegedly privileged data, waives any such privilege. Thus, while petitioners invite this Court to issue a writ of certiorari, merely because it has "never before" (Cross-Petition at 8) considered this particular issue, they offer no convincing reason why the court below should have departed from principles that have historically governed the law of privileges.

Where a plaintiff injects privileged matter into a lawsuit, courts have consistently held that he cannot thereafter assert a privilege to prevent inquiry into the merits of that claim. For example, "offering an attorney's testimony concerning matters learned in the course of his employment waives the attorney-client privilege." *Kammerer v. Western Gear Corp.,* 96 Wn.2d 416, 420, 635 P.2d 708, 711 (1981). *See also Hunt v. Blackburn,* 128 U.S. 464, 470 (1888) (attorney-client privilege waived when client "entered upon a line of defence which involved what transpired between herself and [the attorney]"); *FDIC v. United States,* 527 F. Supp. 942, 950-51 (S.D.W. Va. 1981) (attorney-client privilege waived by affirmative defense

[6] "There is no absolute privilege against the disclosure of political opinion, associations, or activities." 8 *Wigmore on Evidence* § 2214 at 161 (McNaughton rev. 1961). Thus, the First Amendment does not "afford a witness the right to resist inquiry in all circumstances." *Barenblatt v. United States,* 360 U.S. 109, 126 (1959).

relating to advice of counsel); *Hearn v. Rhay*, 68 F.R.D. 574, 581 (E.D. Wash. 1975) (attorney-client privilege waived when party "placed the protected information at issue" for his own benefit). *See generally* 8 *Wigmore, supra*, § 2327. Similarly, where the plaintiff in a personal injury action puts his physical condition directly at issue, he may not thereafter cloak his communications to doctors or nurses with the claim of privilege. *Phipps v. Sasser*, 74 Wn.2d 439, 446-47, 445 P.2d 624, 628-29 (1968). *See also Burlage v. Haudenshield*, 42 F.R.D. 397, 398 (N.D. Iowa 1967) (physician-patient privilege waived by personal injury action); *Awtry v. United States*, 27 F.R.D. 399, 401-02 (S.D.N.Y. 1961) (privilege waived by lawsuit). *See generally* 8 *Wigmore, supra*, § 2388.

None of the case law cited by petitioners modifies or undermines this historic rule. For example, in *Britt v. Superior Court*, 20 Cal. 3d 844, 143 Cal. Rptr. 695, 574 P.2d 766 (1978), the California Supreme Court expressly recognized an exception to evidentiary privileges "as to information that relates to an issue which has been posited by the party claiming the privilege's protection." 20 Cal. 3d at 858. According to the court, "the filing of a lawsuit may implicitly bring about a partial waiver of one's constitutional right of associational privacy," although the scope of such waiver should be narrowly construed. The court held:

> When such associational activities *are directly relevant* to the plaintiff's claim, and disclosure of the plaintiff's affiliations is essential to the fair resolution of the lawsuit, a trial court may properly compel such disclosure.

Id. at 859 (emphasis in original). The court also held that disclosure about a plaintiff's privacy interests may be ordered, although the scope of inquiry depends upon the nature of the injuries which the plaintiff has brought before the court. *Id.* at 864.

Unlike the instant proceeding, the information sought in *Britt* had failed to meet that basic test of relevance. The plaintiffs had commenced an action to recover damages for personal injuries and diminution of property values allegedly

caused by the defendant's operation of an airport in San Diego. The defendant responded with wide-ranging inquiries into the plaintiffs' political activities and unlimited demands into their lifetime medical histories. The California Supreme Court observed:

> From all appearances, plaintiffs' complaints do not relate to, nor put in issue, any aspect of their private associational conduct. Plaintiffs do not seek recovery for any damage to their associational interests, do not claim that any of these injuries were incurred while pursuing associational activities and did not request any relief with respect to the port district's relationship with such associations.

20 Cal. 2d at 859-60. By comparison, the Washington Supreme Court in its decision below held that "[a]ll of the evidence covered by the order compelling discovery was relevant to the plaintiffs' claims and the defense of those claims." (Pet. App. 33a.)[7]

By ignoring the basis of the holding below, petitioners attempt to create the appearance of a conflict where none exists. Thus, the cases that are vaguely offered as examples of the "same troubling issue" (Cross-Petition at 9) are completely consistent with the decision below. In *Hastings v. North East Independent School Dist.*, 615 F.2d 628, 632 (5th Cir. 1980), the defendants' need for disclosure had "evaporated" when the plaintiffs dismissed their claim for monetary damages in order to preserve the anonymity of their membership lists. Similarly, in *Familias Unidas v. Briscoe*, 544 F.2d 182, 192 (5th Cir. 1976), because the plaintiffs' amended complaint had dropped

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[7] In order to satisfy this Court's certiorari requirements, petitioners assert, without explanation, that "[t]he decision of the Washington Supreme Court conflicts with the decisions of all federal circuit courts which have confronted the issue, as well as the California Supreme Court." (Cross-Petition at 10.) *Britt* illustrates that the conflict is purely imagined. Moreover, the only federal circuit case which arguably supported petitioners' position was summarily reversed by this Court. *See Moore v. Black Panther Party*, 102 S. Ct. 3505, 73 L. Ed. 2d 1381 (1982).

their prayer for monetary relief, the court noted that membership identity ceased to be a relevant issue in the lawsuit. *Church of Hakeem, Inc. v. Superior Court,* 110 Cal. App. 3d 384, 168 Cal. Rptr. 13 (1980), involved an effort by the defendants to prevent disclosure of privileged information that was neither placed at issue by them nor relevant to the claims or defenses of any party.[8]

B. Cases That Do Not Involve a Claim for Monetary Relief by the Party Invoking the Privilege Are Not Applicable.

Much of petitioners' case authority, moreover, is wholly irrelevant. In fact, petitioners do not bother to analyze the holdings or argue their application to this proceeding. These cases do not touch upon the straightforward waiver principle adopted by the court below. For example, *Bursey v. United States,* 466 F.2d 1059 (9th Cir. 1972), *Ealy v Littlejohn,* 569 F.2d 219 (5th Cir. 1978), and *In re Rabbinical Seminary,* 450 F. Supp. 1078 (E.D.N.Y. 1978), each involved grand jury investigations initiated by the state, not an affirmative claim for damages brought by the party seeking to halt discovery into his own case. They do not conflict with the Washington Supreme Court's holding.

Petitioners primarily rely upon cases that acknowledge the existence of a type of qualified First Amendment privilege in limited circumstances but mention nothing about the operation of waiver. Thus, these cases are not remotely analogous. They concerned legislative or executive investigations, *Gibson v. Florida Legislative Investigation Comm.,* 372 U.S. 539 (1963); *Surinach v. Pesquera de Busquets,* 604 F.2d 73 (1st Cir. 1979), injunctive actions commenced by the state attorney general,

[8] Thus, none of the cited cases involved an attempt to invoke the privilege in a private lawsuit in order to withhold evidence directly relevant to the parties' claims or defenses. Nonetheless, petitioners invite this Court to invent such a privilege and (Cross-Petition at 14) to limit the Seattle Times at trial to the cross-examination of raw numbers. This Court has already rejected such arguments in a similar case, acknowledging that civil adjudication is best served by "direct inquiry from the actors, which affords the opportunity to refute inferences that might otherwise be drawn from circumstantial evidence." *Herbert v. Lando,* 441 U.S. 153, 172 (1979).

NAACP v. Alabama, supra, public employee disclosure requirements, *Shelton v. Tucker,* 364 U.S. 479 (1960), and election registration obligations, *Brown v. Socialist Workers,* 103 S. Ct. 416, 74 L. Ed. 2d 250 (1982); *Buckley v. Valeo,* 424 U.S. 1 (1976). None rejects the position adopted by the court below.[9]

C. The Court of Appeals Opinion in the *Black Panther* Case, the Sole Decision Supporting Petitioners' Position, Was Summarily Reversed by This Court.

Only one discredited decision arguably supports petitioners' extreme position that they be permitted to proceed with their defamation lawsuit while simultaneously withholding relevant information about their claims. This decision was vacated and its holding summarily reversed by this Court. *Black Panther Party v. Smith,* 661 F.2d 1243 (D.C. Cir. 1981), *rev'd sub nom., Moore v. Black Panther Party,* 102 S. Ct. 3505, 73 L. Ed. 2d 1381 (1982). *Thus,* it hardly stands as persuasive authority for the expansive propositions advanced in the Cross-Petition.

The case involved an action by the Black Panther Party against certain former and current government officials for allegedly conspiring to violate the Panthers' constitutional rights and destroy the organization. When the plaintiffs refused to comply with discovery requests, the District Court granted the defendants' motion to dismiss. *Black Panther Party v. Levi,* 483 F. Supp. 251 (D.D.C. 1980), *rev'd sub nom., Black Panther Party v. Smith,* 661 F.2d 1243 (D.C. Cir. 1981), *rev'd sub nom., Moore v. Black Panther Party,* 102 S. Ct. 3505, 73 L. Ed. 2d.

[9] In determining whether to take what petitioners call the "next logical step in the line of authority" (Cross-Petition at 12) and extend such a privilege to the circumstances of this case, this Court is guided by the basic rule that evidentiary privileges "are not favored, and even those rooted in the Constitution must give way in proper circumstances." *Herbert v. Lando, supra,* 441 U.S. at 175. Whatever their origins, "these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." *Id.* (citing *United States v. Nixon,* 418 U.S. 683, 710 (1974)).

1381 (1982). In dismissing the complaint, the District Court said:

> The Party continues to urge its claim of First Amendment privilege with respect to the names of Central Committee members not previously disclosed (Interrogatory 21), the identity of local leaders of Party affiliates except those published in the *Black Panther* (Interrogatory 33), and the names of individual Party members not already publicly known (Interrogatory 61). Because of the special character of this litigation, which involves a suit brought several years after the alleged events by plaintiffs who have lost or destroyed almost all the relevant documents, the identity of these individuals is critical to the parties sued. These may well be the individuals able to provide defendants with the information necessary for their defense—even to the point of telling them exactly what they are accused of doing. The plaintiffs cannot choose to be litigants and at the same time exempt themselves from the rule of law that binds all federal litigants. They cannot, that is, assert the privilege and at the same time proceed with this lawsuit. . . .

Black Panther Party v. Levi, supra, 483 F. Supp. at 253.

The plaintiffs appealed and the Court of Appeals for the District of Columbia Circuit reversed in a lengthy opinion. *Black Panther Party v. Smith, supra.* The court held that, even though the information sought by the defendants was relevant to the plaintiffs' own claim for damages, the District Court should have applied a balancing test to protect the alleged associational interests of the Black Panthers. Noting that membership lists clearly deserved some First Amendment protection, the court extended this constitutional privilege to the lawsuit in question and rejected the "superficial" waiver rule adopted by the District Court. Applying its proposed balancing test, the Court of Appeals concluded that dismissal of the

Party's claims for failure to comply with discovery requests was unwarranted.[10]

The defendants thereupon petitioned for a writ of certiorari, which was granted by this Court on July 2, 1982. Upon granting the writ, the Court immediately vacated the decision of the Court of Appeals and ordered that the case be "remanded to the United States Court of Appeals for the District of Columbia Circuit with directions that it instruct the United States District Court for the District of Columbia to dismiss the complaint with prejudice." *Moore v. Black Panther Party, supra,* 102 S. Ct. at 3505, 73 L. Ed. 2d at 1381.

II.

PETITIONERS ARE SEEKING AN ADVISORY OPINION WHICH IS NOT WITHIN THIS COURT'S APPELLATE JURISDICTION

A. There Is No Final Judgment or Decree for Review.

This Court lacks statutory jurisdiction to consider the Cross-Petition. The Court's appellate jurisdiction extends only to "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." 28 U.S.C. § 1257. Petitioners do not seek review of a final judgment or decree, because Paragraph 35 of the Order Compelling Discovery states:

> Answers shall be served and filed within 30 days after entry of this order, provided that if any defendant seeks review of the protective order entered in

[10] Even the discredited *Black Panther* decision does not provide support for petitioners' Cross-Petition. The chief reason for departing from the waiver rule was that "the Party is suing the government in part because it believes the government has infringed its First Amendment rights of expression and association" and that application of the rule in these circumstances "would frustrate this purpose." Thus, the court was reluctant to infer waiver of the very rights that the Party went to court to protect. 661 F.2d at 1265-66. Petitioners' lawsuit is a private action for damages and does not allege any constitutional violations. Their tort claims arise wholly under state law.

> this cause, answers shall not be due until such time as the court shall determine by order entered after the review process has been completed, with the court reserving the right to redetermine what discovery shall be ordered in the event the protective order is modified on review.

(Pet. App. 60a). The trial court has reserved to itself the unrestricted and discretionary power to modify or revise the Order Compelling Discovery, depending upon the results of appellate review of the Protective Order.

A final judgment is one in which "[n]othing is left to the judicial discretion of the court below." *Mower v. Fletcher,* 114 U.S. 127, 128 (1885). Thus, there is no final judgment where the eventual scope of discovery remains expressly unresolved, with the court below retaining authority that is not merely "ministerial." *Republic Natural Gas Co. v. Oklahoma,* 334 U.S. 62, 68 (1948). Since 1789, the final judgment rule has served as "an important factor in securing harmonious State-federal relations." *Id.* at 67. *See generally* Note, *The Finality Rule for Supreme Court Review of State Court Orders,* 91 Harv. L. Rev. 1004 (1978).

B. Petitioners' Challenge to the Order Compelling Discovery Is Not Ripe.

The Cross-Petition also fails for lack of ripeness. The Order Compelling Discovery requires no answers to interrogatories, imposes no sanctions, and leaves the scope of discovery open pending review of the Protective Order. Thus, it presents no justiciable case or controversy. Petitioners are simply seeking an advisory opinion for the court below, because the type and extent of discovery that may eventually be required is "wholly speculative." *Communist Party v. Subversive Activities Control Board,* 367 U.S. 1, 79 (1961). "A hypothetical threat is not enough" to trigger this Court's jurisdiction. *United Public Workers v. Mitchell,* 330 U.S. 75, 90 (1947). Where there remains an opportunity for further clarification in the state courts, therefore, this Court will decline jurisdiction. *See Rescue Army v. Municipal Court,* 331 U.S. 549 (1947).

CONCLUSION

The Court should deny the Cross-Petition for a Writ of Certiorari.

Respectfully submitted,

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Counsel of Record for Respondents

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RIESE & JONES

Of Counsel

May 31, 1983

APPENDIX A

IN THE

Superior Court Of The State Of Washington

IN AND FOR THE COUNTY OF KING

No. 82-2-02460-4

KEITH MILTON RHINEHART, a single person; THE AQUARIAN FOUNDATION, a Washington not-for-profit corporation; KATHI BAILEY, a married person, LILLIAN YOUNG, a married person, TONI STRAUCH, a married person, SYLVIA CORWIN, and ILSE TAYLOR, representing women who were members of the Aquarian Foundation on or after March 17, 1978,

Plaintiffs,

vs.

THE SEATTLE TIMES, a Delaware corporation, d/b/a The Seattle Times; WALLA WALLA UNION-BULLETIN, INC.; ERIK LACITIS and JANE DOE LACITIS; JOHN WILSON and REBECCA KAREN WILSON; JOHN MCCOY and KAREN MCCOY,

Defendants.

DEFENDANTS' FIRST INTERROGATORIES TO PLAINTIFF KEITH MILTON RHINEHART [AND ANSWERS THERETO]

TO: KEITH MILTON RHINEHART, *Plaintiff*

AND TO: JACK E. WETHERALL and LINDA E. COLLIER of
GODDARD & WETHERALL
Bear Creek Professional Center
17130 Avondale Way Northeast
Suite 113
Redmond, Washington 98052
Attorneys of Record for Said Plaintiff

In accordance with Civil Rule 33, you will please answer the following interrogatories, separately and fully, under oath, within twenty (20) days of the date of service of these interrogatories upon you.

. . . .

Interrogatory No. 28: If you have been the recipient of gifts or donations in the past ten years, state the name and address of each donor, the date of the gift, the amount of the gift, and the circumstances of each gift.

Answer:

Plaintiff hereby enters his objection of record to the form and substance of interrogatory No. 28. The question is not within the perview of discovery, and to answer the same would invade the privacy and other constitutional rights of members of the Aquarian Foundation.

. . . .

Interrogatory No. 42: Either list all of your current assets and liabilities, or attach a current financial statement to your answers to these interrogatories.

Answer:

See tax returns produced in compliance with request for discovery.

. . . .

STATE OF WASHINGTON
COUNTY OF KING } ss.

KEITH MILTON RHINEHART, being first duly sworn, on oath deposes and says:

That he is one of the plaintiffs in the captioned action; that he has read the within and foregoing answers to defendants'

first interrogatories to plaintiff KEITH MILTON RHINEHART; and believes the same to be true.

/s/ KEITH MILTON RHINEHART

Keith Milton Rhinehart

SUBSCRIBED AND SWORN to before me this 25th day of July, 1980.

/s/ MARGARET M. BLANCHARD

Notary Public in and for the State of Washington, residing at Renton

My Commission Expires: 8/20/82

APPENDIX B

IN THE

Superior Court Of The State Of Washington

IN AND FOR THE COUNTY OF KING

No. 82-2-02460-4

KEITH MILTON RHINEHART, a single person; THE AQUARIAN FOUNDATION, a Washington not-for-profit corporation; KATHI BAILEY, a married person, LILLIAN YOUNG, a married person, TONI STRAUCH, a married person, SYLVIA CORWIN, and ILSE TAYLOR, representing women who were members of the Aquarian Foundation on or after March 17, 1978,

Plaintiffs,

vs.

THE SEATTLE TIMES, a Delaware corporation, d/b/a The Seattle Times; WALLA WALLA UNION-BULLETIN, INC.; ERIK LACITIS and JANE DOE LACITIS; JOHN WILSON and REBECCA KAREN WILSON; JOHN MCCOY and KAREN MCCOY,

Defendants.

DEFENDANTS' FIRST INTERROGATORIES TO PLAINTIFF THE AQUARIAN FOUNDATION AND ANSWERS THERETO

TO: THE AQUARIAN FOUNDATION, *Plaintiff*

AND TO: JACK E. WETHERALL and LINDA E. COLLIER of
GODDARD & WETHERALL
Bear Creek Professional Center
17130 Avondale Way Northeast
Suite 113
Redmond, Washington 98052
Attorneys of Record for Said Plaintiff

In accordance with Civil Rule 33, you will please answer the following interrogatories, separately and fully, under oath, within twenty (20) days of the date of service of these interrogatories upon you.

. . . .

Interrogatory No. 5: Identify by name, title and address each individual who has been contacted by you, your attorneys, or someone acting on behalf of you or your attorneys in connection with the claims in the complaint.

Answer:

Individuals identified in answer to Interrogatory No. 2.

Names of persons contacted by the Aquarian Foundation's attorneys is not within the knowledge of the Board of Directors, but is within the knowledge and control of the attorneys.

The plaintiff's discovery in ongoing and pursuant to the discovery rules, as additional information and/or documents become available, plaintiff will supplement and amend these answers as in its judgment may seem appropriate.

. . . .

Interrogatory No. 19: State the name and address of each bank, credit union, or other lending institution to which you have submitted financial statements in the past ten years.

Answer:

To the best of our knowledge from records available, the only bank, credit union or lending institution to which we have submitted financial statements in the past ten years is United States Bank of Oregon, Hollywood Branch, Portland, Oregon; and on other bank within the last few months, in order to obtain temporary living quarters for ministers, speakers, workers and others who are terrified to work in the Seattle headquarters because of the disruption in Seattle caused by the defendants' articles. [The location of the latter bank is being withheld at this time because the Aquarian Foundation does not want to reveal the city in which the temporary living quarters are being purchased. The Aquarian Foundation will

provide the financial statement, but delete the name, pursuant to Judge Cushing's order allowing Rev. Rhinehart to not reveal his places of hiding.]

. . . .

Interrogatory No. 21: State the name and address of the following: Mr. Mel Wertz; Mrs. Juilie Sequin; Mr. Allen Jenne; Mr. Bob Girrard; Ms. Doris Walton; Ms. Florence Ramoy.

Answer:

The names are as stated in the question. With the exception of Mr. Bob Girrard, who was secretary of the corporation in 1976, the other named individuals are not now, nor in the past ten years have been officers or directors of the Aquarian Foundation. The corporation, therefore, is seeking permission from the named individuals prior to disclosing any addresses the corporation may have.

. . . .

Interrogatory No. 24: If you have been the recipient of gifts or donations in the past ten years, state the name and address of each donor, the date of the gift, the amount of the gift, and the circumstances of each gift.

Answer:

The Aquarian Foundation is, and since its inception twenty-five years ago has been, a church. Since 1966 the Foundation has had a federal tax exemption based on its status as a Section 501(c)(3) religious organization.

Weekly services at branches have been held at the locations set out in previous answers ranging from one to eight years. At such services gifts and donations, largely anonymous, have typically been made. The church does not keep records of all gifts and donations by name and address of donor, date of gift, amount of gift, and circumstance of gift. Such information is in the usual course of events not available to the Foundation when it receives donations. Total yearly figures for contributions are being made available to defendants pursuant to defendants' request for production of documents.

Plaintiff also objects to stating names and addresses of donors on the ground that it believes membership lists are protected, and that by revealing names and addresses of donors the defendants would have access to names of all members.

. . . .

STATE OF WASHINGTON
COUNTY OF KING } ss.

THE UNDERSIGNED, being first duly sworn, on oath deposes and says:

That she is the secretary of THE AQUARIAN FOUNDATION, the plaintiff corporation in the captioned action; that she has read the foregoing answers to defendants' first interrogatories to plaintiff THE AQUARIAN FOUNDATION; and believes the same to be true.

/s/ JILLENE K. AVALOS

Jillene K. Avalos

SUBSCRIBED AND SWORN to before me this 23rd day of July, 1980.

/s/ LINDA E. COLLIER

Notary Public in and for the State of Washington, residing at Seattle

My Commission Expires: _____

APPENDIX C

IN THE

Superior Court Of The State Of Washington

IN AND FOR THE COUNTY OF KING

NO. 82-2-02460-4

KEITH MILTON RHINEHART, a single person; THE AQUARIAN FOUNDATION, a Washington not-for-profit corporation; KATHI BAILEY, a married person, LILLIAN YOUNG, a married person, TONI STRAUCH, a married person, SYLVIA CORWIN, and ILSE TAYLOR, representing women who were members of the Aquarian Foundation on or after March 17, 1978,

Plaintiffs,

vs.

THE SEATTLE TIMES, a Delaware corporation, d/b/a The Seattle Times; WALLA WALLA UNION-BULLETIN, INC.; ERIK LACITIS and JANE DOE LACITIS; JOHN WILSON and REBECCA KAREN WILSON; JOHN MCCOY and KAREN MCCOY,

Defendants.

DEFENDANTS' FIRST INTERROGATORIES TO PLAINTIFF KATHI BAILEY [AND ANSWERS THERETO]

TO: KATHI BAILEY, *Plaintiff*

AND TO: JACK E. WETHERALL and LINDA E. COLLIER of
GODDARD & WETHERALL
Bear Creek Professional Center
17130 Avondale Way Northeast
Suite 113
Redmond, Washington 98052
Attorneys of Record for Said Plaintiff

In accordance with Civil Rule 33, you will please answer the following interrogatories, separately and fully, under oath, within twenty (20) days of the date of service of these interrogatories upon you.

. . . .

Interrogatory No. 25: State the name and address of the following: Mr. Mel Wertz; Mrs. Juilie Sequin; Mr. Allen Jenne; Mr. Bob Girrard; Ms. Doris Walton; Ms. Florence Ramoy.

Answer:

I am not authorized by above persons to give their adresses out.

. . . .

Interrogatory No. 28: If you have been the recipient of gifts or donations in the past ten years, state the name and address of each donor, the date of the gift, the amount of the gift, and the circumstances of each gift.

Answer:

Donations from classes, weddings, funerals, spiritual consultations, etc., are reported to IRS—Forms will be submitted when received from depository. Gifts received for birthday and Christmas were from friends and relatives.

. . . .

STATE OF HAWAII
COUNTY OF HONOLULU } ss.

KATHI BAILEY, being first duly sworn, on oath deposes and says:

That she is one of the plaintiffs in the captioned action; that she has read the foregoing answers to defendants' first interrogatories to plaintiff KATHI BAILEY; and believes the same to be true.

/s/ KATHI BAILEY

Kathi Bailey

SUBSCRIBED AND SWORN to before me this 16th day of July, 1980.

/s/ CAROL LOUISE FALD

Notary Public in and for the State of Hawaii, residing at Honolulu

My Commission Expires: 2/21/82